



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, NAMBUYE & KIAGE JJA)
CIVIL APPEAL NO.48 OF 2014

BETWEEN

MAKHECHA & COMPANY ADVOCATES.....APPELLANT

VERSUS

CENTRAL BANK OF KENYA LIMITED..... RESPONDENT

**(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J.B. Havelock, J.)
Dated 23rd January, 2013**

in

H.C Misc. Civil Application No. 296 of 2012)

ORDER OF THE COURT

**ORDER ON CORRECTION OF TYPOGRAPHICAL ERRORS PURSUANT TO
RULE 35(1) OF THE RULES OF THE COURT.**

Judgment in this appeal was delivered on the 8th December, 2017. On the 1st day of October, 2019, learned counsel **V. Wangui Shaw** addressed a letter under her hand to the Registrar of the Court Ref. No. G/02/0001/VSA bringing to the attention of the Registrar of the Court an apparent typographical error in the Judgment and requested the Registrar of the Court to cause the Judgement to be placed before the Court for correction of the apparent typographical error noted in the Judgment. The salient content of the communication to the Registrar reads as follows:

“We refer to the above matter and the Judgment delivered herein on 8th December, 2017 by Hon. Waki, Nambuye and Kiage, JJA. We have noted that the said Judgment erroneously refers to the Reference that was allowed as being dated 23rd January, 2012 as opposed to 23rd January, 2013 (please find enclosed here with the Judgment for ease of reference).

We write to request the court to effect the correction of the typographical error on the Judgement and the order to read 23rd January, 2013. We look forward to hearing from you.

Yours faithfully

V. Wangui Shaw.”

On 5th November, 2019, the Deputy Registrar of the Court addressed the firm of **Virginia Shaw & Company** Advocates advising them to notify the Advocates for the respondent of their request. Vide a letter dated 12th November, 2019 Ref. M/1/0007/VWS, the firm of **V. Wangui Shaw** Advocates filed a return of service deposed by **Erick Angwaye Karani** on 8th November, 2018, in which the said process server deposes that he had served a copy of the letter of 1st October, 2019 to the respondent in this appeal.

There has been no objection raised by the Advocates for the respondent in this appeal against the request made by the firm of **V. Wangui Shaw** for the correction of the error noted in the Judgment as indicated above.

The respondent is therefore deemed to have no objection to the request for correction of the error indicated in the letter of 1st October, 2019 by the firm of **V. Wangui Shaw** Advocates.

In the result, we now proceed to correct the error as requested for by the firm of **V. Wangui Shaw** Advocates as follows.

Rule 35(1) of the Court provides as follows:

“35(1) A clerical or arithmetical mistake in any judgement of the court, or any error arising therein from any accidental slip or omission may at any time; whether before or after the Judgement has been embodied in an order be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was whether Judgement was given.”

In the exercise of our mandate donated to the Court pursuant to the above **Rule 35(1)** of the rules of the Court, we proceed to make the following correction in the said Judgement.

“At page 10 of the Judgement, line 6 from the top, the year 2012 appearing as the second left word on this line is substituted with the year to read 2013. The entire sentence now to read as follows:

“January, 2013 is hereby set aside and substituted by an order allowing the appellant’s reference.”

There will be no order as to costs for the correction of the above typographical error.

This order on rectification is signed pursuant to **Rule 32(3)** of the Rules of the Court as the Honourable **Mr. Justice P. Waki, JA** (as he was then) has ceased to hold the office as Judge of Appeal upon his retirement.

Dated and Delivered at Nairobi this 6th day of December, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

**I certify that this is a
true copy of the original.**

DEPUTY REGISTRAR.

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 48 OF 2014

BETWEEN

MAKHECHA & COMPANY ADVOCATES.....APPELLANT

AND

CENTRAL BANK OF KENYARESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J. B. Havelock, J) dated 23rd January, 2013

in

Misc. Civil Appln. No. 296 of 2012)

JUDGMENT OF THE COURT

This appeal arises from a ruling and order of the High Court of Kenya at Nairobi (**J. B. Havelock, J**) made on 23rd January, 2013, by which the taxing officer's decision delivered on 12th October, 2012 was upheld. This followed the appellant's reference in respect of an advocate and client bill of costs which was taxed at Ksh. 8,917,163. The appellant had sought some Ksh. 25,299,686 being the balance of fees for professional services rendered to the respondent in High Court Misc. Application No. 427 of 2000.

Aggrieved by that dismissal, the appellant filed a memorandum of appeal against it in entirety stating that the learned judge erred by;

- ***Failing to find that the appellant's acceptance of the outstanding costs was qualified and subject to the earlier agreement contained in the respondent's letter dated 23rd April, 2010.***
- ***Finding that the appellant's acceptance of Ksh.12,972,240 was in full and final settlement of the outstanding advocate/client costs in spite of evidence proving the contrary.***
- ***Ignoring the sum of the respondent settled in party and party costs in the dispute and further erred in failing to apply Schedule VI B of the Advocates Remuneration Order.***
- ***Ignoring the appellant's evidence that the receipt of Ksh. 12,972,240 was qualified and subject to the earlier agreement between the parties that the costs between advocate/client will be subject to Schedule IV B.***
- ***Failing to apply the principle set down in Foakes vs. Beer.***
- ***Failing to set aside the Taxing master's decision on the costs due and in failing to grant the***

appellant's application.

At the hearing of the appeal, **Miss. Shaw** learned counsel for the appellant referred to the letter dated 23rd April, 2010 to the effect that the appellant's acceptance of Ksh. 12,972,240 was part payment of the outstanding advocate/client fees since the parties had agreed that fees would be settled as per **Schedule VI B** of the **Advocates' Remuneration Order**. Building on that, counsel submitted that the learned Judge erred by holding that the agreement was not vitiated by unilateral alteration of the terms by the respondent through its decision to pay half the fees in its letter of 12th May, 2010.

Counsel next faulted the learned judge for misdirecting himself that the amount due to the appellant under item 1 was not Ksh. 12,972,240 instead Ksh. 25,277,480. She contended that the taxing master had made errors in his calculations.

Submitting on grounds 2 and 3, Miss Shaw contended that the appellant qualified its acceptance of the amount offered in payment of the amount due as indicated in its letter dated 13th May 2010. She explained that this fell short of the principle enunciated in the case of ***FOAKES vs. BEER [1884] UKHL 1*** as there was no accord nor was there satisfaction of the debt.

In conclusion counsel submitted that the learned judge was wrong, in failing to appreciate the chronology of events and the law cited before him, which led to a flawed decision.

Rising to oppose the appeal, **Mr. Ouma** learned counsel for the respondent submitted that in line with this Court's decision in ***KIPKORIR TITOO & KIARA ADVOCATES vs. DEPOSIT PROTECTION FUND BOARD [2005] eKLR***, a second appeal must be argued and decided on the points of law and not on facts. He then asserted that the impugned decision was properly made and was grounded on the applicable law.

He further submitted that the letter dated 12th May, 2010 was taken as an agreement on fees at Ksh. 12,972,240 and it is as result of this that the respondent settled the sum of Ksh. 13,656,740. He urged that the ***contra proferentum*** rule should be applied to estop the appellant from reneging on its own agreement since its letter dated 13th May, 2010 was ambiguous.

In brief reply, **Miss Shaw** submitted that one cannot argue the principles in ***FOAKES vs. BEER*** (supra) in a vacuum and urged that the facts be referred to.

We have carefully perused the record, pleadings, the ruling, grounds of appeal and the parties' respective submissions and taken into account the case law cited. Where the judgment subject of the appeal involves exercise of discretion, the Court in considering the appeal should remain guided by the principles enunciated in ***PIL KENYA LTD vs. OPPONG [2009] KLR 442***; that it will not interfere unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. See also ***MBOGO vs. SHAH [1968] E.A 93***.

Upon our consideration of this matter, the main issues that fall for determination are, whether there existed an agreement on fees between the parties and whether the learned judge erred and exercised his discretion wrongly in holding that there was.

From our perusal of the record, the appellant's main argument is that there was no agreement on fees between them. On the other hand, the respondent as evidenced by its letter dated 12th May, 2010 maintained that there was an agreement on fees because the appellant confirmed by a letter dated 13th May, 2010 that the agreed advocate/client fees was Ksh. 12,972,240.

In order to determine whether the letter dated 13th May, 2010 is a valid agreement on fees, the starting point would be to consider **Section 45(1) of the Advocates Act** which provides:

"Subject to section 46 and whether or not an order is in force under section 44, an advocate and

his client may-

- a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;*
- b. before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;*
- c. before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."*

This provision recognizes the enforceability of legal agreements on fees made between clients and advocates. Therefore, to determine this matter, we cannot consider the provision of **Section 45 of the Advocates Act** in isolation. We must take into account the letter in question, its intent and purport, and the conduct of the parties. Was there a legally enforceable contract between the parties herein in respect of the fees? Did the parties intend to be bound by the terms of the agreement which was in the form of the letter in question?

The relevant part of the letter in question dated 13th May, 2010 reads as follows:

"As regards our fees, we are agreeable to settlement of the same as per your letter dated 23rd April, 2010 and confirm that you may proceed to pay us Ksh. 12,972,240."

The letter of 23rd April 2010 stated as follows;

"The Bank is willing to have this matter settled in the following terms:

- (1) Payment of the sum of Ksh. 25,964,480 being the Party & Party Costs awarded by the Court.*
- (2)*
- (3) Settle advocate/client fees payable to yourselves based on the sum of Party & Party Costs agreed upon under (1) above and computed as provided for in Schedule VI B of the Advocates Remuneration Order.*

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On the accepted norms and analysis, the full standard relationship of principal and agent arises where one party consents to the action of the other and such agreement need not be in writing, nor be ratified by the other side either orally or in writing or from conduct expressed. A party is entitled to rely on the appearance of a meeting of the minds to justify that the other side has relied upon or accepted the terms and conditions of the agreement. The meeting of minds can be reasonably inferred from the part payment of the fees in fulfillment of the agreement, and ratification can be assumed if the terms of the contract are partly or fully adopted or settled, and accepted by the other side.

In this case, the appellant contended that the letter in question did not amount to a confirmation of a valid agreement on fees since it had insisted that the fees between the client/respondent would be chargeable under **Schedule VI B** of the **Advocates Remuneration Order**. We are unable to discern a clear acceptance of an offer tabled by the respondent in its 12th May, 2010 letter. It is however clear that the appellant had denied the existence of an agreement that establishes the existence of an intention to create a legal relationship.

Taking into account **Section 45 (1)** of the **Advocates Act**, it is evident from the letter dated 13th May, 2010, that there was no agreement between the parties that the fees payable to the respondent would be Ksh. 12,972,240. As clearly indicated in the letter, the advocate/client fees was to be settled as provided under **Schedule VI B** of the **Advocates Remuneration Order**.

We find that the intention of the Legislature in as far as **Section 45(1)** of the **Advocates Act** is concerned was to ensure that legal agreements on fees were mutually reached between an advocate and client, and that there was no mischief on either side with regard to such agreements. The importance of this proposition was highlighted in **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES vs. JOHN PATRICK MACHIRA T/A MACHIRA & COMPANY ADVOCATES [2013] eKLR** where it was argued that a proper construction of the agreement for remuneration between the parties as evidenced by the exchange of the correspondence, did not reveal that payment of legal fees was contingent upon the success of the contentious proceedings that the appellant was to be engaged in. Nor did it reveal payment of fees at a rate lower than what was provided in the Advocates Remuneration Order, but revealed that in regard to contentious business the appellant advocate was entitled to remuneration by way of advocate/client fees equivalent to 30% of the scale fees, but subject to a limitation of Ksh. 200,000.

Accordingly, we discern from the facts of this case and the conduct of the parties, that there was no agreement on fees as contained in the letter dated 13th May, 2010. It is instructive to note, that all along the respondent never maintained that Ksh.12,972,240 was the total agreed fees, until it fell out with the appellant.

Being of that mind, we find that the learned Judge erred in principle in holding that there was agreement on fees and in consequence dismissing the appellant's reference. Having found that there was no valid agreement on fees, we are satisfied that the appeal has merit and the same is allowed. The ruling dated 23rd January, 2012 is hereby set aside and substituted by an order allowing the appellant's reference.

The appellant shall have the costs of this appeal and of the reference.

Dated and delivered at Nairobi this 8th day of December, 2017. P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR